

**IN THE DISTRICT COURT OF  
DOUGLAS COUNTY, NEBRASKA**

**NEBRASKA DEPARTMENT OF  
HEALTH AND HUMAN  
SERVICES, et al.,**

**Plaintiffs,**

**v.**

**DR. LINDSAY HUSE, in her  
official capacity as Health  
Director of the Douglas County  
Board of Health and in her  
official capacity as the  
purported “Health Director” of  
the City of Omaha, et al.,**

**Defendants.**

**Case No. CI 22-299**

**PLAINTIFFS’ AMENDED  
REPLY BRIEF IN SUPPORT OF  
MOTION FOR TEMPORARY  
INJUNCTION**

**INTRODUCTION**

For nearly the first two years of the COVID-19 pandemic, Defendants have understood themselves to have two avenues to adopt a mask mandate. The first is via an ordinance by the Omaha City Council. This option was utilized in August 2020. The second is via an emergency measure issued by the Douglas County Health Department and approved by DHHS. Dr. Huse tried to pursue this option in August 2021 but stopped when DHHS withheld its approval.

This past practice directly conflicts with Defendants’ argument that all along a health director for the City of Omaha has had the clear power to unilaterally impose a mask mandate throughout the city. If that were true, then why did the City proceed through the cumbersome legislative process of enacting a mask mandate via ordinance in August 2020 and repeatedly extending it into 2021? On Defendants’

telling, Dr. Huse’s predecessor could have simply declared one. Or why, when DHHS did not approve the mandate that Dr. Huse sought to issue in August 2021, did she not immediately issue a citywide mandate under the power she now claims to have always had? None of this makes sense if Defendants’ view of the law is correct.

There is a good reason why Defendants’ story does not add up: Dr. Huse does not have the unilateral power she now asserts. Defendants’ arguments rest on numerous distortions of the law. They begin with Neb. Rev. Stat. § 71-1631, arguing that Subsection 9 of that statute strips the Douglas County Health Department of *all power* to act within the City of Omaha. What Subsection 9 actually does is far more modest. It provides that the Douglas County Health Department’s official “rules and regulations” enacted through a formal rulemaking process do not apply in Omaha. Neb. Rev. Stat. § 71-1631(9). But the County Health Department’s other powers—including its authority to “adopt measures, with the approval of [DHHS], to arrest the progress” of a “contagious or infectious disease”—apply fully in Omaha. Neb. Rev. Stat. § 71-1631(10).

While Neb. Rev. Stat. § 71-1631(9) provides as a baseline that the County Health Department’s “rules and regulations” do not apply in Omaha, Neb. Rev. Stat. § 71-1635 permits municipalities to give “control over all health matters in the county . . . , including all municipalities in the county,” to the county health department. That is precisely what Omaha Municipal Code §§ 12-1, 12-21, 12-22, 12-23, & 12-24 do. In fact, Section 12-23 of that Code explicitly gives the County Health Director “the authority to adopt such rules and regulations . . . as he shall deem necessary to protect the public health of the city.” In so doing, the City Council used its power under Neb. Rev. Stat. § 71-1635 to restore to the Douglas County Health Department the authority withheld under Neb. Rev. Stat. § 71-1631(9) to adopt rules and regulations that apply in Omaha.

Turning from state law to the relevant ordinances, Defendants' interpretation of Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24 is at war with the plain text. Rather than creating and empowering a city health director, those ordinances give authority to the Douglas County Health Director to act within Omaha. Defendants' contrary arguments are built on assumptions and wishes—not the plain language. Because these ordinances grant authority to the Douglas County Health Director (not a city health director), Dr. Huse's mandate conflicts with Neb. Rev. Stat. § 71-1631(10)'s requirement that county health departments must obtain DHHS approval for emergency infectious-disease measures.

Defendants speculate about many far-reaching questions that this Court does not need to address. We ask this Court to decide, first and foremost, whether the power granted under Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24 was given to the County Health Director or a city health director. To resolve that, the Court need not opine on whether a city health department exists (though Dr. Huse concedes it does not, *see* Huse Br. at 9) or whether Omaha has a city health director with other powers. The question is whether the provisions that Dr. Huse invoked to justify her mandate—Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24—empower a city health director to act. Because they do not, an injunction should be entered.

Perhaps most concerning of all is that Defendants' briefs confirm that under their flawed view of the law, Dr. Huse has vast unilateral authority under the ordinances. If Defendants have their way, today's mask mandate might be tomorrow's lockdown order. Putting an end to this unlawful use of authority will ensure that does not happen.

## ARGUMENT

### I. Plaintiffs are likely to prevail on the merits of their claims.

#### A. Defendants misconstrue Neb. Rev. Stat. § 71-1631(9).

Defendants' arguments are built on the premise that Neb. Rev. Stat. § 71-1631(9) entirely "exempts the City of Omaha from the authority of" the Douglas County Health Department. City Br. 10. This is simply wrong, as Subsections 9 and 10 together demonstrate. Subsection 9 addresses only the Douglas County Health Department's "*rules and regulations* for the protection of public health and the prevention of communicable diseases" enacted via the formal rulemaking process, and it says that those rules and regulations do not apply in Omaha. (emphasis added). But Subsection 10 discusses county health departments' (including Douglas County Health Department's) emergency "*measures . . . to arrest the progress*" of a "contagious or infectious disease," and it includes no similar exemption for Omaha. (emphasis added).

By using the words "rules and regulations" in Subsection 9 and "measures" in Subsection 10, the legislature was clearly addressing different actions by county boards of health. *See In re William R. Zutavern Revocable Tr.*, 309 Neb. 542, 558–59, 961 N.W.2d 807, 821 (2021) ("Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered"); 73 Am. Jur. 2d Statutes § 122 (Nov. 2021) ("Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent."). "Rules and regulations," as Subsection 9 expressly indicates, refer to those documents that are officially enacted by the Douglas County Board of Health via a formal rulemaking process. Indeed, the statute states that the referenced rules and regulations are those that [1] are published for three weeks "in a legal newspaper, [2] approved by the county attorney . . . , and [3]

filed in the office of the county clerk of such county.” Neb. Rev. Stat. § 71-1631(9). In contrast, “measures” are emergency orders issued without a rulemaking process to “arrest the progress” of an “infectious disease” often with a specific terminating condition. Neb. Rev. Stat. § 71-1631(10); *see also Measure*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/measure> (last visited Jan. 20, 2022) (defining the noun “measure” as “a step planned or taken as a means to an end”). Consistent with this definition, DHHS refers to the temporary orders that it issues in response to specific emergencies caused by contagious diseases as Directed Health *Measures*. *Anthone Aff.* ¶ 5 (Ex. 6).

Because Section 9’s exemption for Omaha is limited to “rules and regulations” that are enacted via a formal rulemaking process, Defendants are incorrect when they assert that Omaha is wholly outside the Douglas County Health Department’s authority. When read in conjunction with Section 10, it becomes clear that the Douglas County Health Department has always had the power to adopt measures to stop the spread of infectious diseases within Omaha (once it obtains DHHS approval). Dr. Huse is thus wrong when she asserts that “county boards of health lack jurisdiction to enact measures in cities of the metropolitan class, such as Omaha.” *Huse Br.* at 15. The plain text of Neb. Rev. Stat. § 71-1631(10) directly refutes that statement.

Dr. Huse’s own actions contradict her argument that the Douglas County Health Department lacks authority to act in Omaha. Most notably, her mask mandate, which applies only in Omaha, orders “staff from the Douglas County Health Department [to] aid [her] in inspection and enforcement.” *Mask Mandate* at 3 (Ex. 1). Similarly, she intended to issue her August 2021 draft mandate “[o]n behalf of the Douglas County Health Department,” *Aug. 23, 2021 Draft Mask Order*

(Ex. 5), yet that draft did not purport to exempt the city from its scope. These actions directly undermine the arguments Defendants make.

For all these reasons, the lynchpin of Defendants’ arguments—that the Douglas County Health Department cannot take any action in Omaha—is flatly wrong as a matter of law.

**B. The mask mandate exceeds Dr. Huse’s authority under the Omaha Municipal Code.**

As Plaintiffs have established, Dr. Huse exceeds her authority because she purports to adopt her mask mandate in the capacity of a city health director, but the ordinances she invokes empower the *County* Health Director. Defendants ask the Court to infer that those ordinances give power to a city health director, but their arguments ignore, distort, and seek to rewrite the ordinances’ plain text.

Defendants primarily argue that “the City Council defined the ‘health director’ on behalf of the City of Omaha as being coterminous with the director of the Douglas County Health Department.” Huse Br. at 6. But that is not what the ordinance says. It expressly defines the term “director”—the person given the powers in Omaha Municipal Code §§ 12-21, 12-22, & 12-24—to *be* the health “director” of the “Douglas County health department.” Omaha Mun. Code § 12-1. The ordinance does not create a position of city health director and then identify the person who holds that position as the same individual who is the Douglas County Health Director. Defendants are trying to read meaning into the ordinance that is not there. *Hauptman, O’Brien, Wolf & Lathrop, P.C. v. Auto-Owners Ins. Co.*, 310 Neb. 147, 154, 964 N.W.2d 264, 270 (2021) (“it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.”).

Defendants also contend that the 2020 mask mandate ordinance proves that the 1980 ordinances empowered a city health director (rather than the County Health Director). Huse Br. at 7. This too fails. Again, the 1980 general ordinances use the term “health director,” and that “director” is defined as the County Health Director. Omaha Mun. Code § 12-1. In contrast, the 2020 ordinance uses a different phrase: “health director of the city.” *E.g.*, Omaha Mun. Code § 12-52. Using these different phrases confirms that the 1980 ordinances speak of the County Health Director because if the defined phrase “health director” referred to a city health director, there would have been no need to add the words “of the city” in the 2020 ordinance.

Defendants additionally contend that the City has no authority to give powers to a county health department. Huse Br. at 7. But Defendants ignore that Neb. Rev. Stat. § 71-1635 empowers municipalities to give “control over all health matters in the county . . . , including all municipalities in the county,” to the county health department. As discussed above, that is precisely what Omaha Municipal Code §§ 12-1, 12-21, 12-22, 12-23, & 12-24 do. There is thus nothing surprising about the City Council giving authority to the County Health Director. (The problem, as explained below, arises because the City Council violated Neb. Rev. Stat. § 71-1631(10) by giving the County Health Director power to unilaterally impose infection-control measures without obtaining DHHS approval.)

Defendants also argue that the City Council could not have given any power to the County Health Director because Neb. Rev. Stat. § 71-1631(9) forbids her from acting within Omaha. Huse Br. at 8–9. But as previously explained, this argument rests on a misreading of Section 1631(9). That statute only exempts Omaha from the Douglas County Health Department’s formally enacted “rules and regulations” (not its emergency “measures”). Moreover, Omaha Municipal Code §§ 12-1, 12-21, 12-22, 12-23, & 12-24 restored the power to enact rules

and regulations to the County Health Department, using the authority that Neb. Rev. Stat. § 71-1635 affords municipalities.

The County Defendants argue that Plaintiffs' plain text reading of Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24 will jeopardize "the entire system within Douglas County and the City." County Br. at 11. Not so. The many ordinances that the County Defendants cite in their brief refer to the Douglas County Health Director or Health Department and thus further confirm Plaintiffs' position. *See, e.g.*, Omaha Mun. Code §§ 12-91 & 12-93 (using the phrase "health director" in Chapter 12, which defines that term to mean the County Health Director). Importantly, none of those provisions, unlike Dr. Huse's mask mandate and the ordinances she relies upon, conflict with Neb. Rev. Stat. § 71-1631(10). For example, Omaha Municipal Code §§ 6-266 to 6-269 regulate the "keeping of livestock and poultry." Those ordinances do not address emergency "measures" seeking to stop the spread of an "infectious disease." Neb. Rev. Stat. § 71-1631(10).

For her part, Dr. Huse objects that Plaintiffs' position would "tragically leave the City of Omaha" without a health director that has the power to unilaterally issue mask mandates. Huse Br. at 11. As explained above, however, this Court does not need to decide whether a city health director exists. Rather, the Court need only address *who* was given the power to act under Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24. For the reasons stated above, the Omaha Municipal Code clearly gave that power to the Douglas County Health Director. Regardless, it is Defendants, not Plaintiffs, who seek to change the established division of powers nearly two years into a pandemic. The City Council still has the power to address the topic of mask mandates, and the Douglas County Health Department may obtain DHHS approval to issue an emergency mask measure. Plaintiffs are merely seeking to retain the status quo ante that existed long before COVID-19 appeared.



For all these reasons, this Court should conclude that because Omaha Municipal Code §§ 12-1, 12-21, 12-22, & 12-24 give authority to the County Health Director, Dr. Huse cannot use that power to act as a purported city health director. Because that is what she claims to have done, Dr. Huse exceeded her authority under the ordinances.

Plaintiffs' initial brief also explained that Dr. Huse's mask mandate must be set aside because it relies on powers conveyed in general ordinances enacted in 1980 that conflict with specific ordinances addressing COVID-19 mask mandates enacted in 2020. In response, the County Defendants try to distinguish case law. County Br. at 9–10. But they ignore that the Omaha Municipal Code includes its own applicable interpretive rule—that “[i]f conflicting provisions be found in different sections of the same chapter, the provisions of the section which is last in numerical order shall prevail unless such construction would be inconsistent with the meaning of such chapter.” Omaha Mun. Code § 1-7(c). Because the 2020 mask mandate ordinance is located after the 1980 general provisions “in numerical order,” *id.*, that ordinance prevails and forecloses Dr. Huse from unilaterally imposing a COVID-19 mask mandate.

Defendants also argue that there is no conflict between the 1980 general ordinances and the 2020 mask mandate ordinance because the City Council has different powers than Dr. Huse does. Huse Br. at 12. Though it is true that the City Council and Dr. Huse have different powers, that does not prove the absence of a conflict. The 2020 mask ordinance specifically provides that its COVID-19 masking “requirements . . . shall expire and terminate at 11:59 p.m. on May 25, 2021, *unless otherwise extended by ordinance of the city council.*” Omaha Mun. Code § 12-51 (emphasis added). This directly conflicts with reading the general ordinances to allow Dr. Huse to unilaterally impose materially similar COVID-19 masking requirements without a new ordinance. That conflict bars the Court from reading the general ordinances to authorize Dr. Huse's mandate.

**C. The mask mandate conflicts with and is preempted by state law.**

Plaintiffs have established that the mask mandate conflicts with Neb. Rev. Stat. § 71-1631(10). In response, Defendants' main argument is that Section 71-1631(10) does not apply because Dr. Huse was acting in a city capacity. Huse Br. at 11. But as explained above, the cited ordinances give power to the County Health Director, so Dr. Huse's actions under those ordinances fall squarely within Section 71-1631(10)'s call for DHHS approval.

Defendants alternatively rely on Neb. Rev. Stat. § 71-1631(9) to argue that Neb. Rev. Stat. § 71-1631(10) does not apply. City Br. 10. They are mistaken, as explained above. Subsection 9 does not apply to the mask mandate because that provision addresses the Douglas County Health Department's authority to "enact rules and regulations for the protection of public health and the prevention of communicable diseases" through the rulemaking process. Neb. Rev. Stat. § 71-1631(9). Dr. Huse did not adopt a "rule" or "regulation." Rather, she acted under Subsection 10 by issuing an emergency "measure" outside the rulemaking process to "arrest the progress" of a "contagious or infectious disease." Neb. Rev. Stat. § 71-1631(10). Because she issued such a measure under an ordinance that gave her powers as the County Health Director, her mandate is at odds with Neb. Rev. Stat. § 71-1631(10)'s limitation on the actions of county health departments.

**II. Irreparable harm is occurring each day the mask mandate is not enjoined.**

Plaintiffs have cited numerous binding cases establishing that ongoing, continuous, and flagrant violations of state law inflict irreparable harm. *See* Plfs. Br. at 18–19. Without mentioning any of those cases, Defendants summarily assert that the "flouting of state law" is

not an irreparable injury. County Br. at 14. The case law that Plaintiffs have cited says otherwise. Defendants' argument is unpersuasive.

Defendants also argue that Plaintiffs have an alternative remedy at law in the form of a declaratory judgment *after trial*. Huse Br. at 18. But the relevant question for irreparable harm analysis is whether that harm will occur before final determination of the action—*in other words, before trial*. 5 Neb. Prac., Civil Procedure § 18:2 (Mar. 2021). Because Defendants have not refuted the case law establishing that the ongoing violation of state law inflicts an irreparable harm on the State, the availability of declaratory judgment after trial is not an adequate remedy at law. Furthermore, a declaratory judgment, when combined with a request for an injunction, as Plaintiffs have done in this case, is an equitable form of relief rather than a remedy at law. *See Boyles v. Hausmann*, 246 Neb. 181, 185, 517 N.W.2d 610, 614 (1994) (“The test [for determining whether declaratory judgment is legal or equitable] is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action.”).

Defendants lastly contend that possible criminal charges do not constitute “a real and imminent danger of injury.” County Br. at 14. But nowhere do Defendants disclaim their intent to enforce the mask mandate. Consequently, the threat of imminent criminal punishment, including imprisonment, remains ever present in the city so long as the mandate is in force.

### **III. The additional factors that Dr. Huse raises do not justify allowing her to violate the law.**

Dr. Huse asks the Court to consider two additional factors—the balance of equities and the public interest. Huse Br. at 19–22. Her attempt to shift the focus off the legal issues misses the mark.

To begin with, the state statute governing temporary injunctions—Neb. Rev. Stat. § 25-1063—mentions neither of these factors. Dr. Huse relies on nonbinding federal case law to invoke these considerations. Huse Br. at 3. But Nebraska law does not direct courts to consider them in the temporary injunction context.

In any event, these factors weigh strongly in favor of issuing a temporary injunction. Quite simply, the public interest lies in favor of stopping public officials who are violating the law. As the United States Supreme Court just affirmed, even though “the public has a strong interest in combating the spread of . . . COVID-19,” “our system does not permit [government officials] to act unlawfully even in pursuit of desirable end.” *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

Dr. Huse devotes many pages to arguing that her mask mandate is necessary and will benefit the public. Huse Br. at 19–21. But the Nebraska Supreme Court, in a case enjoining a city’s violation of state law, rejected “the City’s suggestion that an unlawful . . . requirement does not ‘harm’ an individual simply because it is believed to be for the individual’s own good.” *Hogelin v. City of Columbus*, 274 Neb. 453, 464, 741 N.W.2d 617, 626 (2007). That the city was acting for the public’s “own good,” the Court reasoned, could not override a violation of state law. *Id.* The same is true here.

Dr. Huse concludes by downplaying the nature and scope of her mandate. But in that discussion, she fails to acknowledge the heavy criminal penalties (up to six months of imprisonment for each violation) that she is threatening to impose. Such a heavy-handed measure should be promptly enjoined.

**IV. The County Defendants ignore the mandate's enforcement directives.**

The County Defendants argue that most of them should be dismissed because they had no role in issuing the mandate. County Br. at 3–5. But “law enforcement” and the “Douglas County Health Department,” which is run by its Health Director and supervised by the Board of Health, are charged with “enforcement” of the mandate. Mask Mandate (Ex. 1). To properly enjoin the mandate, it is necessary to name all officials involved in supervising enforcement. The County Defendants have not claimed that they lack authority to enforce the mandate. Plaintiffs thus properly named all the listed County Defendants.

**CONCLUSION**

For the foregoing reasons, the Court should issue a temporary injunction that enjoins Defendants from (1) enforcing any and all operative versions of the mask mandate issued by Dr. Huse and (2) issuing any subsequent public health measures in violation of state law.

Respectfully submitted this 21<sup>st</sup> day of January, 2022.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the required typeface and formatting rules set forth in Neb. Ct. R. Pldg. § 6-1505 and Neb. Ct. R. App. P. § 2-103 and contains 3,924 words and was prepared using the Microsoft Word program from Microsoft Office 365.

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